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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
Rate Regulation	)	

COMPETITIVE CABLE ASSOCIATION

Comments

The Competitive Cable Association now responds to the Commission's invitation to comment on its proposals in the captioned proceeding. The Association -- also sometimes referred to as CCA -- represents alternate providers of video and audio distribution services. It is open to membership by wireless cable operators, telephone companies, wired cable systems, ITFS arrangements, SMATV installations, 28 GHz proponents, and other multiple channel video distributors, no matter the technology.

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SUMMARY

The Competitive Cable Association believes that Congressionally mandated rate regulation of basic cable television service rates is unconstitutional because rate considerations are likely to impermissibly encroach on programming and content decisions. However, resolution of this mandate's constitutionality awaits another day in another forum.

Given the current inevitability of rate regulation, the Association reiterates its considered view that the need to regulate diminishes in direct proportion to the existence of healthy competition in the market. However, municipalities should not be enabled to regulate an industry to death -- citing lack of competition as the justification -- when they are the culprits behind the monopolistic local cable television operation. Open franchising, on equitable terms and conditions should be the rule. Furthermore, to the extent that rate regulation is allowed, the permissible rate should be maintained throughout an entire cable system. To allow locality discirmination on rates within a system will encourage the subsidization of predatory pricing at the expense of consumers in other jurisdictions served by the same system.

Section 3(a) of the Cable Act of 1992 permits the FCC and the local franchising authorities to establish rate regulations for certain cable systems. CCA believes that rate control over the media -- any media -- may well be *per se* unconstitutional. Yet Congress has required cable operators to provide to their subscribers a basic service tier on which operators must carry all section 4 and 5[1] [of the 1992 Cable Act] mandatory carriage stations; all public, educational or governmental stations which must be carried pursuant to their franchising agreements; and all regular broadcast stations provided by the operators. Congress also directed this Commission to adopt rules to implement the 1992 Cable Act.[2]

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[1] Compliance with Section 5 of the 1992 Cable Act is, for the time being, not necessary since that section of the legislation is currently the subject of a standstill order in *Turner Broadcasting System, Inc., et al. v. FCC, et. al.,* Civil Action No. 92-2247, and consolidated cases pending in the U.S. District Court for the District of Columbia.

[2] No matter which method of rate policing is chosen -- cost-of-service regulation or a benchmark approach -- content decisions will be made based on the need to keep expenses in check. It is anticipated, for instance, that many of the more exciting and innovative cable programming channels which had their genesis in the 1984 deregulation of the cable industry will be moved to other service tiers, not subject to the rate regulation provisions of the 1992 Act. Furthermore, Congress' requirement that a basic, regulated service tier include public, educational, and government channels means that space must be dedicated, of necessity and without regard for public demand for such service, to those channels in lieu of other, possibly more desirable programming.

If cost-of-service regulation is chosen, the regulator must necessarily approve or disapprove of the capital investment and expenses needed for program production. This is the power of the censor. Similarly, the benchmark approach will also impact content decisions. That is, operators will figure out how to arrive at the "prescribed" rate by cutting down on services and costs accordingly. Simply, the cable TV publisher must figure out how much activity he can afford within the mandated price limit.

Furthermore, the type of rate control the 102d Congress has imposed on the cable television industry may actually constitute a

However, the constitutionality of rate control may properly be the province of other fora and, given the abundance of court challenges which are already pending to various sections of the new Cable Act,[3] it is probable that the constitutional concerns will soon be resolved in those fora, and the Competitive Cable Association recognizes that structural regulation of the cable television industry, directed at the abusive behavior of some members of the industry, may be constitutional. *Associated Press v. United States of America,* 326 U.S. 1, 19 (1945).

In any event, it is now incumbent on the Commission to establish procedural rules that will afford the most hope for substantive justice in individual cases and are the most likely to promote the development of the kinds of competition which will eliminate the need for government intervention in the pricing of publications. To those ends, the Commission, CCA respectfully suggests, must recognize the motives, tendencies and practices of both would-be regulators and the regulated.

The cable television franchising process, by its very nature, works to preserve monopolies. The process allows incumbent cable

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"taking" in violation of the dictates of the Fifth Amendment. Because the rights of entrepreneurial cable operators to realize a return on their investments will be impeded in favor of providing for "fair" cable rates for subscribers, rate regulation encroaches on cable operators' property rights. Inherent, also, in any price control regime is the fact that cable operators will have less money to spend on "low earners and loss makers like educational channels." Miller, *Reregulating Means Tying Up Cable,* Wall St. J., April 7, 1992, East Three Star Edition, at A-16.

[3] *Time Warner Entertainment Company, L.P. v. FCC, et al.,* Civil Action No. 92-2494 and *Discovery Communications, Inc. v. United States, et al.,* Civil Action No. 92-2558.

operators to "share" monopoly profits with their "regulators" in the absence of any truly effective competition, while assuring the regulators with the leverage to demand that "sharing," whatever the level of profits. A brief recitation of the history of cable regulation may, it is hoped, illuminate the reasons for the perpetuation of this anti-competitive status quo.

Cable television first developed in the 1950's as a means of providing broadcast television signals to areas where mountainous terrain or sheer distance precluded normal set reception. J. Goodale, ALL ABOUT CABLE, Section 1.02 (1992). During this period, most municipalities placed no significant conditions on entry into the market.

Since the use of the surplus space on utility poles located on *utility* rights-of-way imposed only a minimal, if any, burden upon the *public's* use of the public's easements and rights-of-way and required virtually no municipal services, cities freely authorized the operation of CATV systems by issuing permits or licenses. S. Rep. No. 518, 97th Cong., 2d Sess. at 5 (1982) (hereinafter cited "Sen. Rep. No. 518"). If municipalities regulated cable, they did so via a "permitting" process -- as in a permit to block traffic while stringing cable across a street -- with a view to regulating construction activities and protecting adjacent municipal facilities.

A few courts initially concluded, based on the limited, undifferentiated nature of the CATV product, that utility-like regulation of cable TV was appropriate. *See, e.g., Aberdeen Cable*

TV Service, Inc. v. Aberdeen, 176 N.W. 2d 738 (S.D. 1970). Even though the factual predicates for these decisions were soon to disappear, the predicates were seized upon by the drafters of municipal cable authorizations. Thus, utility-like contractual cable TV franchises developed.

The benefits demanded by the municipalities in exchange for the "privileges" granted by such contractual franchises have grown out of proportion to the original justification of protecting municipal facilities or consumers.

Indeed, these benefits have become the principle justification for the maintenance of the municipal barriers to entry. *Century Federal, Inc. v. City of Palo Alto,* 648 F. Supp. 1465, 1469, 1475-77 (1986).

The CATV industry expanded throughout the 1960's and early 1970's, though development of the medium was somewhat hampered by the fact that it had little to offer other than retransmission of broadcast television signals. And, the early promise of cable's ability to report on local municipal affairs was quickly thwarted by such municipal devices as limitations on the term of operations, and of rate controls.

With the advent of satellite technology in the late 1970's, a wide variety of national programming became available and the medium grew. Today, the cable television industry has emerged as the dominant local medium in all but the most rural areas of the country. *Community Communications Co. v. City of Boulder,* 485 F. Supp. 1035, 1036-38 (D. Colo. 1980) quoted in *Community Communica-*

tions Co. v. City of Boulder, 455 U.S. 40, 44 n. 3 (1982); MULTICHANNEL NEWS, Nov. 16, 1992.[4]

Cable television is now a recognized First Amendment speaker and is neither a common carrier nor any other form of "public utility." *FCC v. Midwest Video Corp.,* 440 U.S. 689, 709 (1979); *Preferred Communications, Inc. v. City of Los Angeles,* 754 F.2d 1396 (9th Cir. 1985), *aff'd.,* 476 U.S. 488 (1986); *Television Transmissions, Inc. v. Public Util. Comm'n.,* 47 Cal. 2d 82, 301 P. 2d 862 (1956).

Satellite technology has even made head-to-head competition between cable operators a reality where it has been allowed. *See,* Sen. Rep. No. 518 at 20-21 referring to the existence of nearly 100 such competitive situations in 1982, and noting a steady increase in frequency of such occurrences. *Report: Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service,* MM Docket No. 89-600, 5 FCC Rcd 4962, 5013-14 (1990). No longer must all cable systems provide the same homogeneous and undifferentiated product. Lee, CABLE FRANCHISING AND THE FIRST AMENDMENT, 36 Vand. L. Rev. 867, 882 n. 57 (1983). One cable "publisher" may now decide to build a "Rolls Royce" system with more than 100 channels and a host of expensive,

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[4] The cable industry has received kudos for the sheer quantity and quality of coverage it provided during the 1992 national elections. "[B]roadcast networks' audiences continue to dwindle and cable audiences continue to grow.... '[H]istorically ABC, NBC and CBS have been phenomenally homogeneous with one another and have echoed the news with the same spin, the same inflection and the same priorities.... To that extent cable has brought a desperately needed diversity of voices and a breath of refreshing air to what has traditionally been a very closed system.'"

still not fully developed "interactive" or "enhanced" data and data-processing services. Another may provide a spartan diet at reduced rates. Systems can and do compete with each other for customers on the basis of price and internal efficiencies. One system owner might choose to carry television station WOR from New York; the other might select WGN from Chicago as a "distant signal," or "superstation." Each might carry "Home Box Office" and "Showtime" -- or one, or neither.

But the one thing that neither cable operator will do is to provide the reportage for which they are both better situated than all other media. They will not produce and "cablecast" investigative reporting designed to display the weaknesses, the foibles, the small time bureaucratic tyrannies, the negligence, the incompetencies, the greed, or even the outright graft of the elected and the appointed municipal officials and the local "establishment" favored by those officials.

The print media awards Pulitzer prizes to those who expose the local bad people. Under the franchising system, the cable industry gives Ace awards to those who do the best apple polishing job for the local city manager or mayor. For example, a California city recently relinquished a $5 million institutional network demanded of its local cable system at the time of franchising on the condition that it receive, in exchange, $180,000 of public-image ads to boost the city's sagging reputation. MULTICHANNEL NEWS, Nov. 16, 1992, p. 36.

Such pervasive municipal control insures that the cable systems will never dare to be critical of those who control city government -- the "franchise authority." Thus, just as Henry VIII and Queen Elizabeth I controlled the printed press in England in the days of the Tudors, the freedom of the cable industry editors to comment on local political affairs has been denied. See Siebert, FREEDOM OF THE PRESS IN ENGLAND 1476-1776, pp. 21-100.

Amazingly, this municipal control is justified by a purported absence of competition -- an absence that only occurs because the municipalities perpetuate same. In fact, Susan Herman, General Manager of the Department of Telecommunications for the City of Los Angeles recently said, "Until competition materializes, we need restored authority to protect cable subscribers who have no alternative." Gerbrandt, MARKETING NEW MEDIA, May 20, 1991, at 1; *but see Preferred Communications, Inc., Clinton Galloway, Carl Galloway, and Perry Parks, Jr., v. Susan Herman, Edward J. Perez, and City of Los Angeles,* No. 92-56109 (filed 8/27/92),[5] where it is alleged that Susan Herman, among others has, for years, acted to deny competition in the City of Los Angeles.

The foregoing recitation is offered in the hope that monopoly

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[5] Susan Herman, General Manager of the Department of Telecommunications, Los Angeles, California is also past-president of the National Association of Telecommunications Officers and Advisors (NATOA), an affiliate of the National League of Cities. NATOA is a professional organization serving citizens through city and county governments and regional authorities in the development, regulation, and administration of cable television and other telecommunications systems. Among its major objectives are research of local government needs in the use, development, and regulation of cable and telecommunications systems. While the organization pays lip service to the ideal of encouraging cable [redacted]

franchising -- with its attendant rate control and other abuses -- can finally be exposed for what it is. In short, it is nothing more than a cozy, symbiotic relationship between the municipal regulator and the regulated entity, a relationship that is justified as being "in the public interest." Meanwhile, the real relief from onerous rates, poor cable service, and other plagues now affecting subscribers is the relief that would flow from an opening of the cable markets to new, healthy competition. Competition *will* evolve and thrive, in CCA's estimation, as soon as the meddlesome municipal regulators yield to the healthy workings of the marketplace for information and programming. It cannot be gainsaid that the need to regulate diminishes in proportion to the existence of healthy competition in the market.

In order to facilitate this goal, CCA respectfully suggests the following:

> First, if a municipality lacks truly open licensing, *i.e.,* franchising based on reasonable terms and conditions, it should not be allowed to regulate rates. In essence, the municipality has created the "monster" -- the non-competitive, monopoly situation of which it complains -- through its refusal to countenance competition. For example, the City of Los Angeles, for just short of ten years, has adamantly refused to allow a would-be competitive operator to enter the South Central Los Angeles and Beverly/Wilshire areas of the City, while the cable administrator, Susan Herman, seeks regulating

authority based on the lack of competition! *Preferred Communications, Inc. v. City of Los Angeles,* 754 F.2d 1396 (9th Cir. 1985), *aff'd.,* 476 U.S. 488 (1986); *Preferred Communications, Inc., Clinton Galloway, Carl Galloway, and Perry Parks, Jr., v. Susan Herman, Edward J. Perez, and City of Los Angeles,* No. 92-56109 (filed 8/27/92).

Secondly, when the Commission's intervention in a rate dispute is sought, it must have rules in place that nullify the anti-competitive rules and practices of both the local regulators and the "friendly" regulated. Such rules should, at a minimum, require a municipality to demonstrate that, as a cable market, the city is wide open to would-be entrants. Such inventions as universal service requirements and other "level playing field" gambits must be condemned for what they really are. Simply, they are the machinations of those who would prefer a cozy twosome -- the locals and the incumbent cable operator -- sharing the spoils of the market while precluding anyone else from serving that market.

Today's "universal service requirements" injure consumers by limiting competition, and by needlessly increasing consumer costs without accompanying benefits. The Federal Communications Commission recently confirmed, in its report to Congress about the state of competition, that competitive cable TV operations generally result in lower prices. *Report: Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service,* MM Docket No. 89-600, 5 FCC Rcd 4962, 5035 (1990). The Commission has already condemned "universal service requirements" as "ill-advised." *Id.*

All other forms of media consistently target their chosen audiences. A competitive cable operator should be able to do so as well. Many successful magazines and other publications started as one pagers until they could build circulation. In short, universal service is a public utility concept that is improperly applied to cable television, a recognized First Amendment speaker. *Preferred Communications, Inc. v. City of Los Angeles,* 754 F.2d 1396 (9th Cir. 1985), *aff'd.*, 476 U.S. 488 (1986).

Third, the Commission should not countenance excessive demands by municipalities, *i.e.*, the sort of demands that are couched in the form of contractual conditions and controls in excess of recognized standards of police power. More than one city has indicated, under the guise of franchising activities, that "although we cannot ask for it, we'll take it if you [the cable operator] offer it."

After 1978, cable television's new found ability to enter urban markets accelerated the use of municipal

Requests for Proposals ("RFPs"), *see generally*, Lee, CABLE FRANCHISING AND THE FIRST AMENDMENT, *supra* at 870-74, as municipalities, large and small, recognized that there was substantial consumer demand for --and numerous potential providers of -- cable services. By claiming that cable's use of the poles and the rights-of-way of power and telephone utilities was a special privileged use of *public* rights-of-way, the cities created a second tollgate between proposed providers and consumers. They thus controlled both the utility market and the cable market by requiring contractual franchises for cable operations within their boundaries. It was self-evident that the value of that control -- the "take" from the new tollgate -- could be far larger so long as the price of access for the "best" operator also bought him protection from competition. *Id.* at 873. And so, by this RFP process, virgin urban and suburban markets all over the country were auctioned off to individual companies who were willing to "offer" the most concessions -- to provide the most tollgate "take" -- and to best demonstrate their willingness to abandon their editorial control. Usually the cities expressly provided that the franchise was non-exclusive, thus reserving their ability to threaten an incumbent operator with competition from a second operator.

The contractual process has been used to finesse any lack of police power authority for the many demands being made. The breadth of these demands have variously included not only control over every detail of the "winning bidder's" cable operations, but the furnishing of funds and facilities for the benefit of the city functionaries and those they favored.

Fourth, if a franchising authority seeks permission to police rates, the FCC must automatically assert jurisdiction over the entire cable system involved, even though that system may serve other jurisdictions not seeking rate control. This will allow the Commission, on a system-wide basis, to deal with anti-competitive practices such as predatory pricing or locality discrimination.

Fifth, to protect the industry from retaliation, the Commission needs to establish controls over the renewal process. The municipal power over renewal and/or termination of franchises has been the prime means of keeping cable operators "in line." There is no more effective way to stifle otherwise Constitutionally protected speech. Once in place, cable facilities are essentially non-salvageable. A failure to renew, or a cancellation of a franchise would be an economic disaster to any cable system.

Conclusion

Again, CCA believes that the need to regulate diminishes in direct proportion to the existence of healthy competition in the market. Since Congress has required the FCC to establish mechanisms by which cable rates may be regulated, it is suggested that the Commission attempt to achieve workable solutions which will encourage the opportunity for competition to develop.

Respectfully submitted

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